

P.E.R.C. NO. 2018-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DIVISION
OF LAW AND PUBLIC SAFETY),

Petitioner,

-and-

Docket No. SN-2018-029

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 33,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Division of Law and Public Safety's (LPS) request for a restraint of binding arbitration of a grievance contesting the title and salary level of a Deputy Attorney General (DAG) who was demoted from Section Chief to a position with non-supervisory duties. Finding that N.J.A.C. 4A:3-4.10 preempts this matter because it expressly, specifically, and comprehensively addresses the issues of title and salary range upon demotion, the Commission restrains arbitration.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Archer & Greiner, attorneys (David
A. Rapuano, of counsel)

For the Respondent, Mets, Schiro & McGovern, attorneys
(Kevin P. McGovern, of counsel)

DECISION

On January 31, 2018, the State of New Jersey, Division of Law and Public Safety (LPS) petitioned for a scope of negotiations determination. LPS seeks to restrain binding arbitration of a grievance filed by the International Brotherhood of Electrical Workers, Local 33 (Local 33). The grievance contests the title and salary range for a Deputy Attorney General (DAG R) subsequent to his demotion.

The parties filed briefs, certifications and exhibits.^{1/} These undisputed facts appear.

Since October 14, 2010, Local 33 has been the exclusive majority representative of a collective negotiations unit comprised of certain Deputy Attorney Generals (DAGs) employed by LPS in non-supervisory positions. Generally, attorneys holding the civil service titles DAG 1 and DAG 2 (on salary ranges Z38 and Z35 respectively) have supervisory responsibilities and are not represented by Local 33, while attorneys holding the titles DAG 3 and DAG 4 (on salary ranges Z33 and Z30 respectively) do not have supervisory responsibilities and are represented by Local 33.

The first collective negotiations agreement (CNA) between the parties was executed on February 12, 2014 and covered the period between July 1, 2013 and June 30, 2015. On March 27, 2014, the Civil Service Commission (CSC) issued a decision relaxing certain civil service regulations to allow Local 33 to represent certain incumbent DAGs who held the titles of DAG 1 and DAG 2 but who did not perform supervisory functions and earned more than \$104,216.79.

^{1/} LPS submitted the certifications of Michelle Miller, its Acting Director, and Yvonne Catley, Deputy Director of the Governor's Office of Employee Relations. Local 33 submitted the certifications of DAG R and Local 33 President Andrew Reese.

The parties current CNA has a term of July 1, 2015 to June 30, 2019. Article VI, Wages and Compensation, provides in pertinent part:

1. Compensation

b.(9) The parties agree that no DAG covered by this unit shall be placed on the ZR35 or ZR38 range. However, that prohibition shall not apply to any DAG who was on the ZR35 or ZR38 ranges prior to the effective date of this agreement. No DAG covered by this unit shall be placed on the Z35 or Z38 ranges as those salary ranges will be utilized for the non-unit functional titles of Assistant Section Chief and Section Chief, respectively.

DAG R was first employed by LPS in 2009 as a DAG 4 and assigned to the Division of Law. On August 19, 2013, DAG R left the Division of Law to become a Special Assistant to the Attorney General, a position specifically excluded from Local 33's collective negotiations unit. On November 28, 2015, DAG R returned to the Division of Law, was promoted to Section Chief, and received the title of DAG 1. As Section Chief is a supervisory position, DAG R remained outside Local 33's unit.

The next personnel action taken concerning DAG R triggered the parties' dispute. On May 2, 2017, DAG R was advised that he would be removed from his position as a Section Chief and moved to a line deputy position.^{2/} As a Section Chief, DAG R was on

^{2/} DAG 3 and DAG 4 titles are generally referred to as "line deputies."

step 2 of the Range 38 salary guide and was earning \$96,321.74 per year.

In July 2017, DAG R was informed his civil service title was changed from DAG 1 to DAG 3 and he would now be on the Range 33 salary schedule.^{3/} However, his present salary would not be reduced.

On August 31, 2017, Local 33 filed a grievance on behalf of DAG R asserting that LPS had violated the terms of the parties' agreement. The grievance asserted that current contract language allowed LPS to maintain a DAG entering the unit to remain, without Civil Service Commission approval, on the higher salary range the DAG had held prior to entry into the Local 33 unit. LPS denied the grievance and Local 33 demanded arbitration. This petition ensued.

In the instant petition, LPS argues that this matter is preempted by civil service regulations, specifically N.J.A.C. 4A:3-3.4 and 3.5,^{4/} as well as N.J.A.C. 4A:3-4.10. In particular, LPS asserts that N.J.A.C. 4A:3-4.10, a regulation addressing the treatment of employees following demotions, preempts arbitration of the grievance filed by Local 33 seeking

^{3/} After DAG R's demotion, he authorized the deduction of dues from his salary and became part of the Local 33 unit.

^{4/} N.J.A.C. 4A:3-3.4 and 3.5 are entitled, respectively, "Title appropriate to duties performed" and "Reclassification of positions."

to maintain DAG R as a DAG 1 and/or maintain him on the range 38 guide.

Local 33 responds that the civil service regulations relied on by LPS do not set the compensation levels for DAGs, and the issue of compensation may be set by the parties through collective negotiations.^{5/} It construes Article VI.1.b.(9) to allow DAG R to maintain his range 38 salary asserting that the article provides that any DAG who held a position paid at Range 38 prior to transferring into a unit position could maintain that salary range.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

^{5/} Local 33 does not challenge LPS's decision to demote DAG R.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[Id. at 404-405.]

Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically and comprehensively. Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Ed. of Higher Ed., 91 N.J. 18, 30 (1982); Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The second prong of the Local 195 balancing test, i.e. whether the subject matter is fully or partially preempted by a statute or regulation, is pertinent to our analysis. N.J.A.C. 4A:3-4.10, "Demotional pay adjustments: State service", states as follows:

(c) If the demotion is other than disciplinary or in lieu of removal under (b) above, the employee's salary shall be reduced one increment in the higher range. Then the employee's salary in the lower range will be set at the step that is equal to or next higher than such reduced salary.

1. The adjustment in (c) above is made after adjustment for workweek. See N.J.A.C. 4A:3-4.9(f).

2. The anniversary date is retained, unless the action results in step eight or nine.

I. If the action results in step eight, the employee shall be eligible for advancement to step nine, if warranted by performance, on the pay period that reflects the difference between the time served on the step prior to demotion and 39 pay periods.

ii. If the action results in step nine, the anniversary date is based on the effective date of the action.

3. This adjustment shall be applied only when the employee has served at least 12 months in the higher title and:

I. The employee has previously held the lower title;

ii. The employee is being demoted in lieu of layoff; or

iii. The Chairperson or designee finds that service in the higher title provided significant preparation and training for service in the lower title.

4. If the conditions in (c)3 above are not met, then salary and anniversary date shall be determined by reconstructing the employee's salary as if the employee had remained in or been appointed to the lower title on the date he or she was appointed to the higher title. N.J.A.C. 4A:3-4.4 may be applied, but in no case shall an employee receive a higher salary than that calculated through the application of (c) above.

We find that N.J.A.C. 4A:3-4.10(c) preempts this matter because it expressly, specifically, and comprehensively addresses the issues of title and salary range upon demotion. Bethlehem Tp. Bd. of Ed. The regulation provides detailed and explicit instructions on the formula to be used to determine an employee's title and salary range upon demotion and leaves no discretion to the employer. As his certification acknowledges, DAG R's change of position was the result of a non-disciplinary demotion which is comprehensively addressed by N.J.A.C. 4A:3-4.10(c). Thus, DAG R's situation is different from the non-supervisory DAGs

addressed in the March 27, 2014 CSC decision who, prior to the formation of the Local 33 unit, were already on salary ranges 35 or 38, not performing supervisory duties and whose salary was greater than \$104,216.79. DAG R's title and salary range upon demotion, which is controlled by N.J.A.C. 4A:3-4.10(c), is a different situation from the "grand-fathered" DAGs discussed in the CSC decision. Any appeal regarding DAG R's change of title and salary range must be raised with the CSC.

Given our finding that this matter is preempted by N.J.A.C. 4A:3-4.10, we need not address whether a managerial prerogative existed to change DAG R's title and salary range upon demotion.

ORDER

The request of the State of New Jersey, Division of Law and Public Safety, for a restraint of arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Boudreau and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Bonanni recused himself.

ISSUED: June 28, 2018

Trenton, New Jersey